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IN THE
Supreme Court of the United States
OCTOBER TERM, 1966

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NO. 27

JAMES V. GILES and JOHN G. GILES,

Petitioners,

v.

STATE OF MARYLAND

**ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND**

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (R. 292-315) is reported at 239 Md. 458, 212 A.2d 101, sub nom. *State v. Giles*. The opinion of the Circuit Court for Montgomery County, Maryland (R. 281-292), has not been reported.

JURISDICTION

The judgment of the Court of Appeals of Maryland is dated and was filed on July 13, 1965 (R. 292, 308). The petition for certiorari was filed on October 4, 1965, and was granted on March 21, 1966 (R. 316). The Court has jurisdiction under 28 U.S. Code § 1257(3), petitioners

claiming rights, privileges and immunities under the Constitution of the United States.

STATUTES AND RULES INVOLVED

The pertinent provisions of the Maryland Constitution, statutes and rules appear in the Appendix, *infra*.

QUESTIONS PRESENTED

1. Whether petitioners were convicted in violation of the due process clause of the Fourteenth Amendment of the United States Constitution by reason of the State's suppression of material exculpatory evidence.
2. Whether, in holding that petitioners were not denied due process by State suppression of exculpatory evidence, the Court of Appeals of Maryland applied erroneous principles with respect to three elements of the suppression doctrine—materiality, prosecution knowledge, and absence of defense knowledge.
3. Whether, in view of Maryland's unique doctrine that the jury is the judge of the law, the Court of Appeals denied petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment by denying relief on the ground that certain of the suppressed evidence, though it concededly "could reasonably be considered admissible and useful to the defense," did not have sufficient exculpatory value.
4. Whether petitioners were deprived of due process of law by application of the Maryland rule that new trial motions based on newly discovered evidence must be filed within three days after verdict.¹

¹ In view of the holding on non-retroactivity of *Johnson v. New Jersey*, No. 762, Oct. Term 1965, decided June 20, 1966, we are compelled to abandon the additional question raised in the petition for certiorari concerning receipt at the criminal trial of admissions obtained from petitioners by police interrogation while they were in custody.

STATEMENT OF THE CASE

The judgment under review is the culmination of a proceeding brought under Maryland's statutory substitute for habeas corpus, the Post Conviction Procedure Act, Md. Laws 1959, c. 429, *infra*, Appendix A. Petitioners were convicted of rape in the Circuit Court for Montgomery County, Maryland. After exhausting all appeals, and after commutation of their death sentences to life imprisonment, petitioners filed a petition under that Act alleging that their convictions had been unconstitutionally procured (R. 1-27). Following an evidentiary hearing, the Circuit Court for Montgomery County ordered a new trial on the ground that petitioners had been denied due process of law under the Fourteenth Amendment by reason of the State's suppression at their criminal trial of material exculpatory evidence (R. 291-92). The Court of Appeals of Maryland, sitting en banc, reversed, two judges dissenting (R. 292-315). 239 Md. 458, 212 A.2d 101.

A. The criminal proceedings.²

Petitioners are brothers, aged twenty-two and twenty, respectively, at the time of trial in December 1961 (R. 101, 120). Because of their indigency petitioners were represented at the criminal trial by court-appointed counsel (R. 295). Petitioners are Negroes. The alleged victim, Joyce Roberts, was a sixteen-year-old white girl. The jury was all white. (R. 50, 52, 153.) Petitioners' defense was that the girl had solicited sexual intercourse (R. 210, 283).³

² The transcript of the criminal trial (R. 29-157) was admitted in the post-conviction hearing as Petitioners' Exhibit 1 (R. 157-58).

³ Maryland has two statutory "ages of consent" - fourteen for the purposes of a felony prosecution, sixteen for a misdemeanor. Md. Code (1957) Art. 27, §§ 462, 464. Sexual intercourse with the prosecutrix was admitted by James Giles (R. 125) and denied by John Giles (R. 104-05).

The evidence at the criminal trial may be summarized as follows:

On the night of July 20, 1961, Joyce Roberts, aged sixteen, accompanied by three men, rode by automobile into woods along the Patuxent River in Montgomery County, Maryland. The car ran out of gas, and two of the men left, leaving Joyce and Stewart Foster in the stalled car. (R. 50-51.)

John Giles, James Giles, Joseph Johnson and John Bowie were fishing and swimming in the river. When they finished, they guided Bowie's car, parked at the river, past Foster's car, and Bowie drove off. (R. 29-30, 35, 51-52, 102-03.) Johnson asked Foster for a cigarette (R. 36, 53, 103, 121, 122). Foster and Joyce Roberts testified that the three young Negroes demanded his money and the girl and threatened him (R. 36, 53). The Giles brothers testified that Foster called them obscene racist names without provocation (R. 103, 122, 131, 133) and leaned down as if reaching for a weapon (R. 104, 122, 134).⁴

James Giles or Johnson or both threw rocks or stones at the car (R. 37, 53, 104, 122). Joyce Roberts left the car and ran into the woods for a distance of thirty feet, where, she testified, she stopped because she fell and was out of breath (R. 53-54, 66). Foster got out of the car, was knocked down by Johnson, and ran off to a nearby home, from which an occupant called the police (R. 37, 123).

While the altercation was still going on at the car, John Giles took a path into the woods and came upon Joyce Rob-

⁴ Johnson did not testify at petitioners' trial. He was also indicted for rape, but his case was severed and transferred to Anne Arundel County. Johnson was convicted and sentenced to death. *Johnson v. State*, 232 Md. 199, 192 A.2d 506. The sentence was commuted by the Governor to life imprisonment at the same time as the commutation of petitioners' sentences. A post-conviction petition filed for Johnson is being held in abeyance pending disposition of the present case.

erts (R. 104, 54). They stayed together and conversed for five to ten minutes according to Joyce, for fifteen to twenty minutes according to John Giles (R. 55, 66, 104-05). According to both Joyce and John Giles, she offered him sexual intercourse if he helped her get away (R. 66, 104).

James Giles and Johnson left the car, entered the woods, and came upon Joyce and John Giles (R. 124). According to the Giles brothers (R. 105, 115, 124), but contrary to Joyce's testimony (R. 55), Joyce called to James Giles and Johnson when they approached.

According to Joyce's testimony, the three men "leaned around" and were kissing her. "One of the boys reached for the zipper in my shorts and I said 'No' and one of them said 'Either you do it or we will do it' and so I said 'I will' and I took my shorts and underpants off." The three men then had sexual intercourse with her. Joyce did not call out, resist, or remonstrate. She testified that she had the intercourse because she was afraid. (R. 55-56, 64, 66, 71.)

According to the testimony of the Giles brothers, Joyce urged them and Johnson to have intercourse with her. James Giles and Johnson accepted the invitation, John Giles did not and left the scene before James Giles and Johnson engaged in intercourse. Joyce removed her clothes entirely on her own volition. She was not threatened or held. She directed the order in which the men should have intercourse with her and assisted them. She told them that she had had sexual intercourse with sixteen or seventeen boys that week, and two or three more wouldn't make any difference. (R. 104-05, 112, 115-16, 124-27, 141, 144.) Joyce denied making such a statement (R. 69).

John Giles testified that when he and Joyce were alone in the woods together she told him that she was on a year's probation and didn't want to get into any trouble (R. 104, 112, 113). He also testified that after James Giles and Johnson had joined them, Joyce said "something about

she was on probation" and couldn't afford to be caught in the woods, not even with her boy friend, and if she were caught she would have to charge rape (R. 105). James Giles testified that while he was having intercourse with Joyce she said she was in trouble and couldn't afford to be caught and that if she were caught in the woods she would have to say she was raped; she did not refer to "probation" in his hearing (R. 127, 140, 146).

On cross-examination, Joyce denied that she had said that she was on probation and if caught by the police would have to tell them that she was raped (R. 69). On redirect examination by the State, she testified that she had not been on probation at the time of the episode (R. 70). On cross-examination of John Giles, the State's Attorney ridiculed his testimony about the probation. Thus the State's Attorney asked: "So you were on probation and she was on probation and so you just sat down and talked?" "What did you talk about when you two probationers sat down?" "How long were you in this woods, with that probationer, when somebody found you?" (R. 114.)

A physician who examined Joyce immediately after the event testified to finding evidence of sexual intercourse. He gave no testimony indicating forcible penetration. (R. 45.)

James Giles and Johnson were arrested on July 21, 1961 (R. 80-81), and John Giles on July 23, 1961 (R. 82). Under questioning by the police, John Giles denied having had intercourse with Joyce (R. 92), and James Giles said that the girl had volunteered to have intercourse (R. 95) and had assisted him (R. 126-27).

The jury returned a verdict of guilty against each petitioner on December 5, 1961 (R. 164, 120). On December 11, 1961, the trial court (Judge James H. Pugh) sentenced petitioners to death (R. 166-57, 154).

The convictions were affirmed by the Maryland Court

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of Appeals on July 18, 1962 (*Giles v. State*, 229 Md. 370, 183 A.2d 359; R. 281), and an appeal to this Court was dismissed for want of a substantial federal question. *Giles v. Maryland*, 372 U.S. 767.

A motion for a new trial on grounds of newly-discovered evidence was made and denied as untimely, and the denial was affirmed by the Court of Appeals (R. 281; *Giles v. State*, 231 Md. 387, 190 A.2d 627; see *infra*, p. 13). On October 24, 1963, Governor J. Millard Tawes commuted petitioners' sentences to life imprisonment (R. 281).

B. The post-conviction proceeding.

On May 11, 1964, petitioners filed in the Circuit Court for Montgomery County a petition, supported by numerous affidavits and other exhibits, seeking to set aside their convictions under the Post Conviction Procedure Act (R. 1-27). The petition alleged various violations of the due process clause of the Fourteenth Amendment, of which there survive claims that the State had suppressed material exculpatory evidence and that Maryland procedural rules unreasonably precluded petitioners from obtaining a new trial on the basis of newly-discovered evidence.

On November 10, 1964, following an evidentiary hearing (R. 157-280), the trial court (Judge Walter H. Moorman) found that petitioners had been denied due process under the Fourteenth Amendment by reason of the State's suppression of evidence and ordered that petitioners be accorded a new trial (R. 297-92). Other claims made by petitioners were denied (R. 289-91). On appeal by the State, the Court of Appeals of Maryland, two judges dissenting, reversed, holding that there had not been an unconstitutional suppression of evidence and agreeing with the rulings of the trial court that were adverse to petitioners (R. 292-315). 239 Md. 458, 212 A.2d 101.

1. The claimed suppression of evidence.

The evidence claimed to have been suppressed falls into two categories: (a) certain incidents which occurred between the date of the alleged rape (July 20, 1961) and the beginning of petitioners' criminal trial (December 4, 1961), and (b) what we call Joyce Roberts' "near-probation status." We next state separately the evidence adduced at the post-conviction proceeding relevant to each category and the holding below with respect thereto.

(a) The incidents following the alleged rape.

On the night of August 26, 1961, Joyce Roberts attended a party in Edmonston, Prince George's County, Maryland. There she had sexual intercourse with one man in the bathroom and with another in the yard outside the house. (R. 23-27, 182-84, 296.)

In the early morning of August 27, 1961, Joyce took a large overdose of pills. She was placed in the psychiatric ward of Prince George's General Hospital for ten days, the hospital record showing a diagnosis of attempted suicide and psychopathic personality and that her chief complaint was "Don't want to live." (R. 296, 24, 162, 167-69, 179, 218, 238, 279-80, 284-85.)

While in the hospital, Joyce was visited by a friend, Robert Bostic. Joyce told him that she had taken the overdose of pills because she had been raped at the August 26 party by the two men with whom she had had intercourse that night. Bostic relayed this information to Joyce's mother, and a formal complaint of rape against the two men was lodged with the police by Joyce's father. (R. 23-27, 179, 184, 192, 284-85, 296.)

As a result of the complaint, Detective Sergeant Wheeler, of the Prince George's County police, visited Joyce Roberts on September 1, 1961, in the psychiatric ward of the hospital. Joyce first told Wheeler that the two men at the party had had sexual relations with her against

her will. When Wheeler questioned her further, she admitted that she had offered only token resistance to the first man — merely removing his hands from her body several times — and no resistance at all to the other man, and that no threats had been made to her. She told Wheeler that she had been reluctant at that time to have intercourse with the two men only because she thought that if she did so, they would tell the other boys at the party and all of them would want to have intercourse with her. Were it not for this apprehension, she said, she would willingly have had intercourse with both men. Joyce also told Wheeler that she had voluntarily engaged in sexual intercourse in the past with one of the two men. She further admitted that during the preceding two years she had had numerous acts of sexual intercourse with a large number of boys and men, many of whom were unknown to her, and that she had engaged in oral sodomy on many occasions. When asked by Wheeler why she had accused the two men of rape, she said that she had told Bostic this to explain why she took the overdose of pills. She also told Wheeler that she would refuse to testify against the two men if they were charged with rape. Wheeler marked the police file "closed unfounded." (R. 25-27, 179-85, 189-92, 296-97.)

Soon after September 1, 1961, Wheeler learned that Joyce Roberts was involved in a rape case in Montgomery County (R. 188). He was not interviewed by the State's Attorney or police of Montgomery County (R. 191). Since neither the State's Attorney nor the police lieutenant in charge of the investigation in Montgomery County knew of the facts obtained by Wheeler (R. 198-200, 252-54), it is clear that Wheeler did not communicate his information to the Montgomery County authorities.

At the post conviction hearing, petitioners introduced psychiatric testimony that an attempted suicide by a sixteen-year old girl is a strong indication of serious mental illness (R. 237-43).

Petitioners also introduced at the post-conviction hearing testimony by John Patrick Stephens, a friend of Joyce Roberts, that on the Saturday night before her alleged rape by petitioners (on Thursday, July 20, 1961), she told him that on the preceding weekend she had gone to a party in Baltimore where she was the only girl, that there were about sixteen boys there, and she had had relations with all of them. The testimony was stricken on objection of the State (R. 160-61).

The Court of Appeals held that for the purposes of the suppression doctrine, the prosecution was charged with knowledge of the Montgomery County police, as well as with knowledge of the prosecutors themselves (in Maryland, the State's Attorney for the particular county and his assistants), but not with knowledge of the police of other counties (R. 303).

Detective Lieutenant Whalen of the Montgomery County police was in charge of the police investigation of the alleged rape of Joyce Roberts by petitioners and Johnson (R. 195). As was found below (R. 303-04), Whalen and Leonard T. Kardy, the State's Attorney for Montgomery County, knew, prior to petitioners' criminal trial, that Joyce had attempted suicide (R. 189-99, 251-52). As also found below (R. 303-04, 296, 297), both Whalen and the State's Attorney learned, prior to petitioners' trial, that Joyce had allegedly been raped again, and the State's Attorney knew that there had been no prosecution for this second alleged rape (R. 199-200, 252-53). Whalen also knew that Joyce's mother had taken her to see a psychiatrist (R. 297, 200-01). When Joyce's family told Whalen that Joyce had again been raped, this time in Prince George's County, he advised them to report to the authorities of that county, and then paid no further attention to the matter (R. 199-200, 296).

The Montgomery County police and prosecutor made no investigation of the character, background or record of Joyce Roberts (R. 198, 200, 203, 206, 253-55). As a

result, neither the State's Attorney nor Lieutenant Whalen knew the following things which Sergeant Wheeler knew but did not communicate to the Montgomery County authorities: (1) that Joyce had related to Wheeler a fantastic history of sexual promiscuity, (2) that she had initiated the second rape accusation, (3) that the accusation was palpably false, and (4) that she had been hospitalized in a psychiatric ward.

Prior to and during the trial, the defense knew nothing about the incidents which we have described. All that petitioners' assigned attorney knew about Joyce Roberts was what petitioners had told him about their encounter with her. (R. 212-13, 215.) He attempted to obtain records of the Juvenile Courts of Montgomery and Prince George's Counties concerning Joyce, but was not permitted to see them (R. 212, 295). He and the lawyer assigned to defend Joseph Johnson visited Joyce's home in an attempt to see her, but they were denied access to her by her mother. The mother also refused to discuss the case with them, saying that she was acting on instructions from Lieutenant Whalen. (R. 210-11.)⁵

The Court of Appeals held, however, that because of petitioners' account to their attorney, "the defense must have known of the prosecutrix' general reputation for unchastity and that she was a sexually promiscuous girl" (R. 306).

The Court of Appeals held (R. 304) that "the prosecution should disclose to the defense such information as it

⁵ Moreover, Joyce was undoubtedly not at home. Unbeknownst to defense counsel (R. 212), the State's Attorney and Whalen, desiring to have Joyce "in protective custody," arranged to have the Juvenile Court for Montgomery County commit her to a State School for Girls on September 5, 1961 (R. 195-96, 204-06, 249-51, 275-77). This was done even though Joyce was a resident of Prince George's County (R. 206). On April 30, 1962, the Juvenile Court of Montgomery County marked its file, "Closed - No longer [sic] residing within the jurisdiction of the Court" (R. 277).

has that may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory, and where there is doubt as to what is admissible and useful for that purpose, the trial court should decide whether or not a duty to disclose exists." The court assumed that under this test the prosecution had a duty to disclose the information it had relating to Joyce Roberts' second rape accusation and attempted suicide. It held, however, that this undisclosed information was not sufficiently material and exculpatory so as to make the non-disclosure prejudicial and violative of due process (R. 304-08). Two judges of the en banc court dissented on the ground that the evidence admittedly withheld was important in itself to the defense and would also have been usable as a basis for further investigation (R. 309-15).

(b) Joyce Roberts' real probation status.

We have already reviewed the conflicting testimony at the criminal trial as to whether Joyce had told petitioners at the scene of the alleged rape that she was on probation, in trouble, couldn't afford to be caught, and if caught would have to charge that she was raped. *Supra*, pp. 5-6.

At the post-conviction hearing it was stipulated that at the time of the alleged rape, July 20, 1961, there was pending in the Juvenile Court for Prince George's County, Maryland, a petition alleging that Joyce was beyond parental control and a recommendation of the court's case worker that Joyce be put on probation (R. 174).

Joyce's friend Stephens testified at the hearing that on the Saturday before July 20, 1961, Joyce told him that "she did not want to go down into the Hyattsville, Maryland area because she was in trouble on her probation" (R. 159).

After petitioners were arrested, they told the Montgomery County police that Joyce had told them that she was on probation, and this allegation of theirs was seen in the

police report by the State's Attorney for Montgomery County (R. 247, 249). Neither the State's Attorney nor the police made any effort to ascertain whether Joyce Roberts was on probation on July 20, 1961 (R. 200, 203, 249). Consequently, neither the State's Attorney nor the police of Montgomery County knew of Joyce's near-probation status (R. 206, 246).

Petitioners' assigned counsel knew about Joyce only what petitioners had told him of her statements at the scene of the alleged rape (R. 212). He tried to ascertain, prior to the criminal trial, whether there were Juvenile Court proceedings against Joyce Roberts in Montgomery County and Prince George's County, but was refused access to the court records (R. 212, 295).

The Court of Appeals held (R. 308) that there was nothing in the record to show a withholding of evidence with respect to Joyce's near-probation status.

2. The Maryland rule on newly-discovered evidence.

On November 16, 1962, petitioners filed in the Circuit Court for Montgomery County a motion for a new trial based upon newly-discovered evidence. The motion was denied on November 20, 1962, on the ground that under Rules 567 and 759 of the Maryland Rules of Procedure (Appendix A, *infra*), promulgated by the Court of Appeals of Maryland, a motion for a new trial must be filed within three days after the verdict. The denial was affirmed on the same ground by the Court of Appeals on May 6, 1963. (R. 3, 281, 293, 295, 299.) *Giles v. State*, 231 Md. 387, 190 A.2d 627.

It is also Maryland law that newly discovered evidence does not furnish grounds for relief in post-conviction proceedings, including habeas corpus, coram nobis, and the statutory substitute for those writs. *Daniels v. Warden*, 223 Md. 631, 161 A.2d 461; *Diggs v. Warden*, 221 Md. 624, 157 A.2d 453. Under Maryland law, therefore, prior to a

recent modification made too late to benefit petitioners,⁶ there was no avenue for obtaining relief from a conviction on the basis of evidence discovered more than three days after verdict.

Petitioners assembled documented evidence, discovered more than three days after their conviction, which was highly probative of their innocence (R. 8-27). Under Maryland law, described above, this evidence was, of course, not admissible at the post-conviction proceeding (see, e.g., R. 192-96), except insofar as it related to the suppression claim.

The newly-discovered evidence included evidence of the following:⁷

(1) The matters mentioned in our preceding discussion of the suppression claims. These include Joyce Roberts' attempted suicide; her second, unfounded rape accusation; the sexual promiscuity and perversion related by her to Wheeler; and Stephens' testimony that on the Saturday before her alleged rape by petitioners she had told him things very similar to those she allegedly told petitioners — that she was on probation and had had sexual relations the previous weekend with sixteen boys.

(2) Joyce Roberts manifested an insouciant attitude toward the alleged rape. A day or two after the episode, she told a man friend that the Negroes who had allegedly

⁶ On July 12, 1965, effective September 1, 1965, the Maryland Court of Appeals amended Maryland Rule 764 (Md. Ann. Code (1957), vol. 9B, Cum. Supp. 1965), so as to authorize trial courts to entertain new trial motions on the ground of newly-discovered evidence if the motions are filed within ninety days after sentence or within ninety days after receipt of a mandate of the Court of Appeals affirming the conviction or dismissing the appeal therefrom.

⁷ Our description includes material from the following sources: affidavits appended to the post-conviction petition, offers of proof at the post-conviction hearing, some testimony which entered the record of that hearing.

raped her "were bigger and better than white boys" (R. 178, 18). Within a week after, she flippantly told a restaurant owner who asked her what had happened that "one or two more did not make that much difference to her" (R. 13-14).

(3) Joyce manifested promiscuous and depraved sexual behavior on numerous occasions (R. 8-10, 15-19.)

(4) Stewart Foster, who, according to petitioners' testimony had provoked the altercation at the car by calling petitioners' obscene, racist names, was an habitual brawler and frequently employed the peculiar epithet ascribed to him by petitioners (R. 12-13, 15, 18, 20, 194-95).

(5) In conversations with friends after the alleged rape, Foster gave accounts of the altercation at the car which closely corresponded to petitioners' version of how the altercation came about (R. 10, 11-12, 194).

The Court of Appeals held that petitioners were not denied due process of law by the application of the Maryland law precluding judicial consideration of evidence discovered more than three days after verdict (R. 299).

SUMMARY OF ARGUMENT

I.

The Court has held that suppression by the prosecution of material evidence favorable to an accused upon request violates due process. When such suppression existed, a conviction is vulnerable to collateral attack by habeas corpus or its statutory equivalent.

A defense request for production of the evidence is not a prerequisite. The lower courts have so held, and the rationale of the suppression doctrine applies regardless of a request. A request requirement would stultify the suppression rule since the need for disclosure is greatest when the defense is least able to know what, or

whether, to demand. Dispensing with a request requirement does not increase the burden of the State, which is already under a duty to disclose exculpatory evidence.

The elements of the suppression rule are, therefore, materiality of the undisclosed information; actual or constructive knowledge of the prosecution; absence of actual or constructive knowledge of the defense.

By analogy to cases in which the constitutional vice is the admission of evidence, the test of materiality in a suppression case is whether the undisclosed evidence, if revealed, might have affected the outcome of the trial.

The court below inverted the correct test, applying a principle that suppressed evidence is immaterial if it might not have affected the result.

The evidence of the prosecutrix' near-probation status was material because it would have corroborated petitioners' version of the episode and supplied a motive for a false accusation against them. Non-disclosure of this evidence enabled the prosecution to convey a false impression by testimony elicited at the trial.

The evidence that the prosecutrix had made an unfounded accusation of rape against two other men a month after she had accused petitioners would have been admissible and would have dramatically supported the defense contention.

The evidence of the prosecutrix' second rape accusation, her sexual promiscuity, her confinement in a psychiatric ward, and her attempted suicide, would have been admissible to impeach her credibility as indicative of mental illness. Her disclosures to Sergeant Wheeler of her promiscuity would also have corroborated petitioners' testimony that at the scene of the alleged rape she told them that she had already had sexual intercourse with sixteen or seventeen other boys that week.

The information concerning the prosecutrix' promis-

culty would also have supplied leads to evidence of her reputation for unchastity.

Finally, if the evidence had been disclosed, the defense could have applied for, and should have received, an order for a pre-trial mental examination of the prosecutrix.

The court below found, and the evidence shows, that the Montgomery County State's Attorney and police knew that the prosecutrix had been involved in another rape accusation, shown by investigation to be groundless, that she had attempted suicide and been hospitalized, and that she had visited a psychiatrist. This information was in and of itself material. In addition, had it been disclosed a diligent defense would have discovered the further material information in the possession of the Prince George's County police and the hospital.

The prosecution should be charged with constructive knowledge of the evidence claimed to be suppressed of which the Montgomery County authorities did not have actual knowledge. This is because the failure to acquire such knowledge was the result of their determined avoidance of, exposure to information favorable to the accused, in violation of their duty to conduct criminal investigations impartially and with rudimentary diligence. The State should also be charged with the negligent failure of Sergeant Wheeler to convey his information to the Montgomery County authorities after he learned of the prosecution pending in that county.

The defense did not know of any of the evidence claimed to have been suppressed. The court below charged the defense with constructive knowledge of some of the undisclosed information, but the attributed knowledge is not coextensive with the suppressed evidence. Moreover, defense counsel could not validly be charged with constructive knowledge, because his failure to obtain the information was not caused by lack of diligence. And accused persons cannot be held responsible for a failure

of even non-diligent counsel to obtain exculpatory information in the hands of the State.

II.

The evidence acknowledged below to have been suppressed would have been admissible, but the Court of Appeals held that its exculpatory value was insufficient to require a new trial. In view of Maryland's unique provision that the jury is the judge of the law, this substituted in an erratically selected class of cases court determination for jury determination of the exculpatory value of admissible evidence. Hence the decision below violates the equal protection clause.

III.

Maryland law afforded no opportunity for petitioners to obtain judicial consideration of the massive, after-discovered evidence of their innocence. Due process requires that a denial of access to the judicial forum not be arbitrary or irrational, and that a state provide to condemned persons a reasonable opportunity to demonstrate their innocence by newly-discovered evidence. The Maryland rules offend a "fundamental" principle of justice, shock the conscience, and discriminate against impoverished defendants.

ARGUMENT

Petitioners were convicted in violation of the "due process clause by reason of the State's suppression of material exculpatory evidence.

A. The suppression doctrine is available to petitioners and does not require a request for production.

The Court held in *Brady v. Maryland*, 373 U.S. 83, 87:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Because this rule announces a constitutional defect, it is clear that it is available to an accused not only on direct review of a conviction, but also, as here, in a collateral attack by habeas corpus or its statutory equivalent. *Brady* itself involved a proceeding under the Maryland Post Conviction Procedure Act, and the suppression decisions on which *Brady* relied⁸ were all habeas corpus cases. Moreover, the Maryland Court of Appeals held in this case that suppression of material exculpatory evidence "is ground for relief under the P. C. P. A." (R. 301).

In *Brady* the defense had requested production of the evidence withheld by the prosecution, a fact which accounts for the "upon request" qualification of the passage quoted above. We believe, however, that a defense request for disclosure is not a prerequisite to application of the sup-

⁸ See *Brady* at 86, citing *United States ex rel. Abner v. Baldi*, 195 F.2d 815 (3d Cir.); *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir.); *Mooney v. Holohan*, 294 U.S. 103; *Pyle v. Kansas*, 317 U.S. 213.

pression doctrine. This appears, first of all, from the authorities. The court below in this case,⁹ as well as all other courts which have applied the suppression doctrine,¹⁰ considered that a disclosure request is not an essential element. Secondly, the rationale of the suppression doctrine, the "avoidance of an unfair trial to the accused" (*Brady*, at 87), applies whenever the prosecution withholds exonerating evidence, whether or not disclosure was requested. Thirdly, a request requirement would stultify the suppression rule, since the need for disclosure is greatest precisely when the defense is so unaware of the exculpatory evidence as not to know what, or even whether, to demand. Fourthly, dispensing with a request requirement does not increase the burden of the State. Even absent a request, a prosecutor has a moral and professional duty to disclose exculpatory evidence,¹¹ and a significant breach of this duty requires that a new trial

⁹ The court below stated the rule as follows (R. 301): "It is clear that the suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process and is ground for relief under the P.C.P.A. *Brady v. State*, 226 Md. 422, 174 A.2d 187 (1961), *aff'd*, 373 U.S. 83 (1963); *Strosnider v. Warden*, 228 Md. 663, 180 A.2d 654 (1962)."

¹⁰ See cases cited *supra*, footnote 8, p. 19, and *Baybee v. Warden*, 331 F.2d 842, 845 (4th Cir.); *United States ex rel. Meers v. Wilkins*, 326 F.2d 135, 137 (2d Cir.); *Ashley v. Texas*, 319 F.2d 80 (5th Cir.); *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill.); *Smallwood v. Warden*, 205 F. Supp. 325 (D. Md.); *Application of Kapatos*, 208 F. Supp. 883 (S.D. N.Y.); *People v. Riley*, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings Cty. Ct.).

¹¹ Canon 5, Canons of Professional Ethics (American Bar Association), provides: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." See *Berger v. United States*, 295 U.S. 78, 88. The duty of the prosecutor to safeguard a fair trial requires him "to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried." *United States v. Zborowski*, 271 F.2d 661, 663 (2d Cir.). The duty is magnified in the case of impoverished defendants. *Ellis v. United States*, 345 F.2d 961, 963 (D.C. Cir.).

be granted on a direct appeal without regard to constitutional compulsion.¹²

We shall proceed, therefore, on the assumption that prosecution suppression of material exculpatory evidence vitiates a conviction without a defense request for disclosure. It is evident that a non-disclosure meets this formulation if three conditions are met: (1) the undisclosed exculpatory information¹³ is material; (2) the prosecution has, or is by law chargeable with, knowledge of the undisclosed information; (3) the defense does not have, and is not chargeable with, such knowledge. In what follows we will deal with these topics in turn. There is no disagreement that the information claimed to be suppressed was not disclosed by the prosecution at or prior to petitioner's criminal trial.

B. The information claimed to be suppressed was material to the issue of guilt or innocence.

1. The standard of materiality.

The suppression doctrine originated in decisions declaring convictions unconstitutional if the State had used at the trial material testimony known to it to be false.¹⁴ In such a situation, the test of materiality is whether the false testimony "may have had an effect on the outcome of the trial." *Napue v. Illinois*, 360 U.S. 264, 272. As

¹² *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 571 (2d Cir.); *Griffin v. United States*, 183 F.2d 990 (D.C. Cir.); *Ellis v. United States*, *supra*; *Commonwealth v. Miller*, 203 Pa. Super. 511, 201 A.2d 256.

¹³ It is obvious that the "suppression of evidence" doctrine is more correctly described as a "suppression of information" doctrine.

¹⁴ *Pyle v. Kansas*, 317 U.S. 213, 216; *Mooney v. Holohan*, 294 U.S. 103. See also *Hyaler v. Florida*, 315 U.S. 411, 413; *White v. Ragen*, 324 U.S. 780; *Alcora v. Texas*, 355 U.S. 28; *Napue v. Illinois*, 360 U.S. 264.

Napue holds, this test may be satisfied by evidence which is relevant only to the credibility of a witness. Similarly, where unconstitutionally obtained evidence has been admitted, "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87.

In *Napue*¹⁵ and *Fahy* the constitutional vice was the admission of evidence. In all reason, a similar standard must apply in the cognate situation where the vice is the non-disclosure of evidence. Hence the test of materiality in a suppression case is whether the undisclosed evidence, if revealed, might have affected the outcome of the trial. This standard has in fact been previously employed by the Maryland Court of Appeals,¹⁶ as well as by other courts.¹⁶

A standard less favorable to the accused is particularly inappropriate in a case like this one, involving a capital offense, indigent defendants, and a Maryland rule which, by precluding new trials on the basis of after-discovered evidence, gave extraordinary finality to the criminal trial and thereby a maximum effect to the suppression of exculpatory evidence.

¹⁵ *Brady v. State*, 226 Md. 422, 174 A.2d 167, aff'd sub nom. *Brady v. Maryland*, *supra*. The court in *Brady* expressed "considerable doubt as to how much good" the undisclosed evidence would have done the accused. 226 Md. at 429, 174 A.2d 171. It then held that "it would be 'too dogmatic' for us to say that the jury would not" have attached any significance to this evidence. . . ." 226 Md. at 430, 174 A.2d at 171.

¹⁶ *Berbes v. Warden*, 331 F.2d 842, 847 (4th Cir.) ("One cannot possibly say with confidence that such a defect in trial was harmless."); *Swallowood v. Warden*, 205 F. Supp. 325, 338 (D. Md.) (the withheld evidence "might well have affected the result of the trial."); *People v. Riley*, 131 Misc. 288, 83 N.Y.S.2d 281, 284 (Kings Co. Ct.) (the withheld evidence "could have been helpful to the defendant."); *United States ex rel. Thompson v. Dye*, 221 F.2d 762 (2d Cir.) (the withheld evidence was cumulative).

Even if the court below had purported to apply the correct standard of materiality, its determination of that issue would not be binding, and this Court would still make its independent evaluation of the record. *Napue v. Illinois*, *supra*, at 271-72. Nevertheless, it is significant that the court below plainly inverted the correct standard. The court applied not the principle that suppressed evidence is material if it might have affected the result, but rather a contrary principle that the evidence is immaterial if it might not have affected the result.

The court stated its theory as follows (R. 302):

"We think that in order for the nondisclosure of evidence to amount to a denial of due process it must be such as is material and capable of clearing, or tending to clear the accused of guilt or of substantially affecting the punishment to be imposed in addition to being such as could reasonably be considered admissible and useful to the defense."

This passage treats as distinguishable three concepts — "material," "tending to clear the accused," and "useful to the defense" — which, by normal usage mean the same thing. The explanation is that the court gave a unique meaning to "tending to clear the accused" — that evidence has such a tendency only if it is foolproof. This appears from the reasons which the court gave for holding that certain of the withheld evidence failed the test of materiality. Thus the court ruled that evidence that the prosecutrix was suffering from nymphomania would contribute "nothing to show . . . that she had consented" to having sexual intercourse with petitioners (R. 307-08). Only slightly less extreme were these other speculations of the court:

(1) Mental illness of the prosecutrix on August 26, 1961, the date of the attempted suicide, would not be material for impeaching her credibility because her testimony

was given some three months later, on December 4, 1961 (R. 304-05).¹⁷

(2) The attempted suicide was not material because the jury might have concluded (incorrectly) that it was indicative of emotional disturbance caused by the prosecutrix' alleged rape by petitioners and Johnson (R. 305).

(3) In unwitting contradiction of (2), the attempted suicide was not material because it "was an outgrowth of an incident totally unrelated" to the alleged rape by petitioners (R. 305).

(4) The prosecutrix' second rape accusation was not material because it was made to her boy friend and not to the police (R. 307, 296).¹⁸

¹⁷The court justified this conclusion by asserting (R. 305) that the psychiatrist who testified in the post-conviction proceeding stated that the attempted suicide on August 26 would not permit an opinion as to the prosecutrix' mental condition at the date of trial. The assertion represents a misreading of the testimony. The psychiatrist first did express an opinion on the subject, saying that "there is a substantial risk that she would still be mentally ill three-and-a-half months later" (R. 241). Then occurred a confusing exchange with the trial judge, in which the witness' response could be interpreted to mean that he could not give such an opinion (R. 242). But the witness then contradicted the possible contradiction by testifying that he did have an opinion about how the mental illness would affect the person's credibility as a witness (R. 243). The trial court inexplicably sustained objections to the efforts of petitioners' counsel to clarify the testimony (R. 243-44). In any event, it takes no psychiatrist to appreciate that even if the prosecutrix had recovered from mental illness during the three-month interval, the existence of such illness at the time of the episode or between the episode and the trial could well have affected her ability to recall the episode accurately even if it did not affect her veracity at the trial.

¹⁸The court overstated the evidence in saying (R. 307) that Joyce Roberts denied to Sergeant Wheeler that any rape had occurred. She first told Wheeler that the two men at the Edmonston party "had had sexual relations with her against her will" (R. 182) — clearly an accusation of rape made to a police officer. Then, under questioning by Wheeler, she divulged the facts which showed her accusation was unfounded, without ever acknowledging that she had not in fact been raped (R. 182-85, 25-27).

(5) Evidence indicative of mental illness was not material to impeach the prosecutrix' credibility, because it did not establish mental incompetence as a witness or contradict her trial testimony (R. 305-06).

These infelicities show not only that the court applied an erroneous standard of materiality, but that it utterly failed to appreciate the realities of the situation. At the criminal trial, the case came down to an issue of credibility between the prosecutrix and the accused. See *supra*, pp. 3-6; *Giles v. State*, 229 Md. 370, 381, 183 A.2d 359, 364; *Johnson v. State*, 232 Md. 199, 205, 199 A.2d 506, 509. Petitioners introduced nothing to impeach the credibility of Joyce Roberts or to corroborate their version of the events. An all-white jury had to decide between believing the unimpeached testimony of a young white girl and the unsupported testimony of petitioners that she had solicited sexual intercourse with three Negro strangers. The result was a foregone conclusion. The matter would have been otherwise, however, had the defense been in possession of the information which we claim was suppressed. For this information, as we shall show, would have corroborated petitioners' version, would have impeached the credibility of the prosecutrix, and would have made believable the otherwise implausible defense of consent. On any rational basis, therefore, the information was material.

2. The materiality of the prosecutrix' near-probation status.

As already related, petitioners testified at their criminal trial, and Joyce Roberts denied, that while they were in the woods and prior to any sexual intercourse, Joyce told them that she was on probation, that she was in trouble, that she could not afford to be caught with them, and that if caught she would have to claim that she was raped. After their arrest, petitioners told the police that Joyce had said she was on probation (R. 249). Joyce testified,

under redirect examination by the State, that she had not been on probation, and on cross-examination the prosecution ridiculed John Giles' testimony that she had said she was on probation. *Supra*, pp. 5-6.

It was stipulated at the post-conviction hearing that at the time of the alleged rape, July 20, 1961, there was pending in the Juvenile Court for Prince George's County, Maryland, a petition alleging that Joyce was beyond parental control and a recommendation of the court's case worker that Joyce be put on probation. There was also introduced at the post-conviction hearing uncontradicted evidence that Joyce knew of her near-probation status on July 20, 1961, regarded it as actual probation, and was worried about getting into more trouble. This evidence consisted of testimony of one of Joyce's boy friends, John Patrick Stephens, that on the Saturday before July 20, 1961 (a Thursday), Joyce told him that "she did not want to go down into the Hyattsville, Maryland area because she was in trouble on her probation." *Supra*, p. 12.

The materiality of Joyce's near-probation status cannot be gainsaid.¹⁹ Petitioners had no way of knowing, unless Joyce had told them, that she was "in trouble" and in a status which she reasonably could (and did) call "probation." And her telling them such a thing manifestly negated rape, corroborated their version of the episode, and supplied a motive for her falsely to accuse them of rape.

Moreover, if the prosecution was chargeable with knowledge of the status, it did more than passively sup-

¹⁹ The court below did not pass on the materiality of this evidence but held, without explanation, that the record did not show "a withholding of evidence" of the near-probation status (R. 308). Since it is unquestionable that the status was not divulged to the defense (see *infra*, p. 36), the court's holding must be based on the fact that the State's Attorney and Lieutenant Whalen did not know of the status. For the reasons why the prosecution should be charged with such knowledge, see *infra*, pp. 34-38.

press evidence. Its ridiculing of John Giles' testimony on cross-examination and its eliciting of testimony from Joyce that she had not been "on probation" conveyed to the jury that petitioners' testimony was an inept invention made out of whole cloth.²⁰ In this respect, therefore, the case is like *Alcorta v. Texas*, 355 U.S. 28, which granted habeas corpus relief because the State had elicited testimony which, though literally true, gave the jury a false impression by omitting relevant facts known to the prosecution.

3. The materiality of the incidents following the alleged rape.

Petitioners encountered Joyce Roberts on the night of July 20, 1961. Their criminal trial began on December 4, 1961.

On August 27, 1961, Joyce attempted suicide, following which she was confined in a hospital psychiatric ward for ten days. While in the hospital she told Bostic that she had been raped by two men at a party on the night of August 26, 1961. When interviewed in the hospital by Detective Sergeant Wheeler, she disclosed to him the falsity of this accusation and her history of sexual wantonness. *Supra*, pp. 8-9.

Evidence of the above events was material in several respects.

(a) The evidence that Joyce Roberts had made an unfounded accusation of rape against two other men a month after she had accused petitioners would have dramatically supported the defense theory that her charge

²⁰ The zeal with which the State sought to exploit the testimony on probation also appears in the cross-examination of James Giles. He testified on direct that Joyce had told him that she was "in trouble" and "couldn't afford to be caught" (R. 127). But on cross, the prosecutor repeatedly represented that he had testified that Joyce had said she was on probation (R. 140).

against petitioners was likewise false. This evidence could have been fortified, if that were thought necessary, by a wealth of proof that modern medical science has established the existence among some young girls and women of a psychic compulsion of contriving offenses by men. See materials collected in 3 Wigmore, Evidence (3d ed. 1940) § 942a, and more recent authorities cited in *Ballard v. Superior Court*, 49 Cal. Repr. 302, 410 P.2d 838, 846.

In sex cases, a prosecutrix' prior accusations of sexual molestation are admissible in evidence.²¹ In *Smallwood v. Warden*, 205 F. Supp. 325 (D. Md.), suppression of a prior rape accusation was one of the grounds for granting habeas corpus relief.

(b) The evidence of Joyce's second rape accusation, her sexual promiscuity, her confinement in a hospital psychiatric ward, and her attempted suicide, would have been admissible to impeach her credibility as indicative of mental illness or emotional disturbance. This evidence could also have been fortified by psychiatric opinion testimony, based upon the evidence of her behavior, impeaching her testimonial reliability.²² As the expert testimony

²¹ *Rice v. State*, 195 Wis. 181, 217 N.W.2d 697; *State v. Wesler*, 137 N.J.L. 311, 59 A.2d 834, aff'd, 1 N.J. 58, 61 A.2d 746; *People v. Hurlburt*, 166 Cal. App. 2d 334, 333 P.2d 82, 86; *People v. Evans*, 72 Mich. 367, 40 N.W. 473; *People v. Wilson*, 170 Mich. 669, 137 N.W. 92; *State v. Poston*, 199 Iowa 1073, 203 N.W. 257.

²² Among the types of evidence admissible to impeach a witness' credibility on grounds of mental disturbance are the following. Conduct indicative of nymphomania: *People v. Cowles*, 246 Mich. 429, 224 N.W. 387; *Miller v. State*, 49 Okla. Cr. 133, 295 Pac. 403; *People v. Bastian*, 330 Mich. 457, 47 N.W.2d 692. Attempted suicide: *State v. Poolos*, 241 N.C. 382, 85 S.E.2d 342; see *United States v. Soltes*, 391 F.2d 236, 242 (2d Cir.). Past confinement in mental institution: *Powell v. Winan*, 287 F.2d 375 (5th Cir.); *United States v. Pagliaro*, 153 F.2d 497, 499 (2d Cir.); *People v. Kirkes*, 249 P.2d 816, 832 (Dist. Ct. App.), aff'd, 39 Cal. 2d 719, 249 P.2d 1; *Wolley v. State*, 249 Miss. 136, 136 So.2d 543. Psychiatric opin-

at the post-conviction hearing showed, the attempted suicide by this sixteen-year-old girl in itself established a likelihood of serious mental disorder (R. 240-41).

Evidence of a witness' mental illness goes not to character, but to the capacity and ability of the witness to perceive and describe accurately his or her experiences and, in sex cases, to the witness' bias against a class (men) to which the accused belong. 3 Wigmore, *op. cit.* §§ 931, 963; McCormick, Evidence (1954) 99. Under the cases, the suppression of evidence indicating possible mental illness of a State's witness requires habeas corpus relief.²³

(c) At the criminal trial petitioners testified that prior to any acts of intercourse Joyce had told them that she had already had sexual intercourse with sixteen or seventeen other boys that week and two or three more wouldn't make any difference (*supra*, p. 5). This testimony, if believed, obviously would have been powerful evidence of consent.

The evidence of Joyce's disclosures to Sergeant Wheeler of her extraordinary promiscuity would have corroborated petitioners' testimony by establishing the definite possibilities that (1) she had had intercourse with sixteen or seventeen other men that week and (2) she would have recounted such an experience, whether real or fictitious. Furthermore, an alerted defense might have

ion testimony, whether based on observation of the witness or on instances of aberrant behavior: *Powell v. Wiman*, 293 F.2d 605 (5th Cir.); *Ashley v. Texas*, 319 F.2d 80 (5th Cir.); *Coffin v. Reichard*, 148 F.2d 278, 280 (6th Cir.); *United States v. Hiss*, 88 F. Supp. 559 (S.D. N.Y.); *Taborshy v. State*, 142 Conn. 619, 629-30, 116 A.2d 433, 437-38; *People v. Cowles*, *supra*; *State v. Butler*, 27 N.J. 580, 143 A.2d 530, 552; *Rice v. State*, *supra*; *Bouldin v. State*, 87 Tex. Cr. R. 419, 222 S.W. 555; *State v. Wesley*, *supra*. In sex cases, prior accusations of sexual molestation: cases cited *supra*, p. 28, footnotes 21.

²³ *Powell v. Wiman*, 287 F.2d 275 (5th Cir.); *Powell v. Wiman*, 293 F.2d 605 (5th Cir.); *Smallwood v. Warden*, *supra*; *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill.).

discovered in time for the trial other evidence along the same line, such as testimony of Joyce's friend, Stephens, which was introduced at the post-conviction hearing but then stricken. Stephens testified that on the Saturday night before Joyce's alleged rape by petitioners she told him that on the preceding weekend she had had sexual relations with sixteen boys at a party in Baltimore (R. 160-61).

It is of no consequence that the Maryland court has excluded evidence of prior unchaste acts when offered in a rape case as evidence of consent of the prosecutrix.²⁴ The evidence here would be offered not as proof of propensity, but to corroborate petitioners' testimony of what Joyce had told them at the scene of the alleged rape. It is a commonplace that evidence inadmissible for one purpose may be admissible for another. Nor can it be assumed that the Maryland courts would extend their rule beyond all semblance of rationality to cases involving evidence of nymphomania rather than sporadic instances of unchastity.

The court below virtually conceded that the evidence of the attempted suicide and second rape accusation could "reasonably be considered admissible and useful to the defense" (R. 304). Such a showing of potential value should be enough to satisfy the suppression rule. To demand more would require impractical and abstract speculation about the ways in which evidentiary questions might arise and the solutions which an ingenious defense might find.

(d) As the court below recognized (R. 306), Maryland law permits the admission in a rape prosecution of evidence of the prosecutrix' general reputation for unchastity. If the defense had had the information possessed by Sergeant Wheeler, it would have had ample leads to the obtaining of such evidence. For Joyce's second rape

²⁴ *Shertzer v. State*, 63 Md. 149. Other jurisdictions are sharply divided. See cases collected in 140 A.L.R. 382-90.

accusation located the house where the party of August 26, 1961, had been held and the names of the two men with whom she had had intercourse that night (R. 24).

(e) Finally, had the defense known of Joyce's second rape accusation, her attempted suicide, her hospitalization as a mental patient, and her bizarre sexual history, it could have applied for, and should have received, an order that she receive a pre-trial mental examination. Trial courts have discretionary authority, stemming from their inherent power over witnesses and the admission of evidence, to order such examinations, and should do so on a proper showing. *State v. Butler*, 27 N.J. 560, 143 A.2d 530, 552-56; *Ballard v. Superior Court*, 49 Cal. Rep. 302, 410 P.2d 838, 849; *State v. Klueber*, 132 N.W.2d 847, 850 (S. Dak.). Wigmore admonishes, *op. cit.* § 924a, "No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." This view has the strong support of expert commentators.²⁵ Indeed, had the Montgomery County police and prosecutor been more conscious of their responsibilities, they would, under the circumstances of this case, have taken the initiative to obtain a psychiatric examination before instituting prosecution.

If a mental examination of the prosecutrix had been ordered, it is possible that she would have agreed to the examination. Considering what is now known of her history and of her attitude soon after the alleged rape (see *supra*, pp. 8-9, 14-15), the results of such an examination would probably have been destructive of her credibility.

If the prosecutrix refused to be examined, the court could exclude her testimony or permit the defense to comment on her refusal. *Ballard v. Superior Ct.*, *supra*.

²⁵ See texts cited in *Ballard v. Superior Court*, *supra*, 410 P.2d at 846; Wigmore, *loc. cit.*

C. The prosecution knew, or is chargeable with knowledge of, the evidence claimed to be suppressed.

1. The prosecution's actual knowledge.

The Maryland Court of Appeals held (R. 303) that for the purposes of the suppression doctrine the prosecution was charged with the knowledge of the prosecutors themselves (the State's Attorney and his assistants) and of the police of Montgomery County, "the local subdivision that has jurisdiction to try the case." To attribute to "the prosecution" knowledge of the investigating police is plainly reasonable and is in accord with the other decisions on the subject.²⁶

Applying this principle, the Court of Appeals charged the prosecution with knowledge of the following: "that Joyce Roberts had probably been involved in some sexual activities with boys on the evening of August 26th under circumstances not amounting to criminal rape, on which her father preferred rape charges, but which investigation showed were groundless; that on the same evening she had intentionally taken an overdose of sleeping pills in an attempt to commit suicide and as a result had been admitted to a hospital; and that for reasons known only to her mother, the mother had taken her daughter to a psychiatrist" (R. 304). This holding is plainly impelled by the testimony of the State's Attorney for Montgomery County and Detective Lieutenant Whalen, who was in charge of the County's police investigation. See *supra*, pp. 10-11.

The information found by the Court of Appeals to be

²⁶ *Barbes v. Warden*, 331 F.2d 842, 846 (4th Cir.); *Hall v. Warden*, 222 Md. 590, 159 A.2d 316. The prosecution is also responsible for false testimony by a policeman. *Strossnider v. Warden*, 223 Md. 663, 180 A.2d 854; *Curran v. Delaware*, 259 F.2d 707 (3d Cir.).

known to the prosecution — involvement in a second, false rape accusation, attempted suicide, and visiting a psychiatrist — was, for reasons already canvassed, in and of itself material. Assuming absence of defense knowledge, the non-disclosure of this information was therefore an unconstitutional suppression without more.

But there is an additional reason why the concededly known information was material. Had it been disclosed, a diligent defense would have discovered even more material information. The State's Attorney for Montgomery County knew, as he testified at the post-conviction hearing (R. 252-53), that the second rape accusation had been investigated in Prince George's County. Had he disclosed his knowledge, the defense would have been led to the police department of that county and thereby to the information obtained and reported by Detective Sergeant Wheeler of the Prince George's Police Department. This information showed that the second rape accusation had originated with Joyce Roberts' tale to Bostic, that the accusation was indubitably false, and that Joyce had and admitted to a fantastic history of sexual promiscuity and perversion. Disclosure of the prosecution's knowledge of Joyce's suicide attempt and hospitalization would have led the defense to the Prince George's County General Hospital, and thereby to a record of an admitting diagnosis of psychopathic personality (R. 279) and to the fact that she had been placed in the psychiatric ward.

In determining the materiality of suppressed information, it is reasonable to consider not only the information which was actually known to the prosecution, but also the further information which investigation would have discovered had the prosecution fulfilled its duty of disclosure. And this is particularly true if, as was the case here (see *infra*, pp. 34-38), the only reason why the prosecution's knowledge was limited was its culpable failure to investigate the matter which came to its attention. As the dissenting opinion below stated (R. 315), "The State cannot claim the withheld information was unusable by

the defense because the prosecution chose to know no more."

2. The prosecution's constructive knowledge.

Kardy, the State's Attorney for Montgomery County, and Lieutenant Whalen denied knowledge of Joyce Roberts' near-probation status, nor does the record reveal that they knew of her sexual promiscuity. They knew that there had been a second rape accusation, but not that it was a false charge originated by Joyce. They knew that Joyce had attempted suicide and had been hospitalized, but not that she had been placed in the psychiatric ward. *Supra*, p. 10.

The matters not known by the Montgomery County authorities were known by other State officials — the near-probation status by the Juvenile Court authorities in Prince George's County and everything else by the police department of Prince George's County, particularly Sergeant Wheeler.

The court below refused to charge the prosecution with the knowledge possessed by the Prince George's County officials on the ground that to do so "would impose a practically impossible and unworkable burden on local authorities" (R. 303).

In our view, the court failed to analyze the problem correctly. The constitutional issue was whether the State, not just "local authorities," was at fault in failing to provide a fair trial for petitioners by reason of the non-disclosure of exculpatory evidence. If an obligation of disclosure exists at all, clearly the State is responsible for the fault of the local prosecutor and local investigating

²⁷ But, as we have already noted, the defense would have discovered the matters not known by Kardy and Whalen, with the exception of the near-probation status, had they disclosed what they did know.

police. On the other hand, it cannot realistically be said that the State is at fault whenever, and simply because, some other State official has the undisclosed information in his possession. For the latter official may not be at fault in failing to disclose it. Yet if the circumstances are such that he, acting as an agent of the State, is at fault, then so is the State, his principal.

In the present case, the non-disclosure of the information not known to Kardy and Whalen was caused by a double fault. The Montgomery County prosecutor and police, and therefore the State, were at fault because, as we later develop, their failure to acquire the information was caused by a gross breach of their duty, owed to both the public and those accused, to conduct criminal investigations impartially and with rudimentary diligence. Adherence to such a duty would have required no greater burden of them than was already demanded by the proper execution of their official responsibilities. On this ground, the "prosecution" was chargeable with constructive knowledge of Joyce's near-probation status and of the information in the possession of the police of Prince George's County.

The State was also at fault because Sergeant Wheeler, of the Prince George's County police, failed to communicate his sensational information to the Montgomery County authorities *after he learned of the case pending against petitioners (supra, p. 9)*. For surely it is an elementary, routine and non-onerous duty of the police of one county to communicate to the police of a sister county information relevant to a prosecution which they know is underway in the latter jurisdiction. Indeed, it is inconceivable that Sergeant Wheeler would not have notified the Montgomery County police had he acquired information which favored the prosecution rather than the defense. On this ground, the prosecutors were chargeable with constructive knowledge of the information in Sergeant Wheeler's possession because their failure to acquire such knowledge was due to Wheeler's fault (as well as to their own).

It seems beyond question that the Montgomery County State's Attorney and police were grossly negligent and indifferent to their obligation to conduct an unbiased investigation, and that this negligence was the cause of their failure to learn of Joyce's near-probation status and of the matters known to the Prince George's County police. The circumstances known to the Montgomery County authorities were such that any responsible police officer and prosecutor could not help but realize the need to investigate the character and background of the prosecutrix and to seek facts to confirm the account of the accused.

From the outset, the police knew of the findings of the physician who examined Joyce and of the conflicting accounts of Joyce and petitioners.

The physician found evidence of sexual intercourse, but not of forcible penetration. *Supra*, p. 6.

By Joyce's own story (*supra*, pp. 4-5): She, a 16-year-old girl, was alone in the woods, late at night, with a 21-year-old man. They had gone there with two other men. They were, she said, to be joined by two of her girl friends, but these never appeared. They were, she said, going swimming, but she had no bathing suit with her. When the altercation at the car started, she ran into the woods for only 30 feet. When John Giles joined her there she quietly conversed with him for about ten minutes. She was the first to introduce the subject of sex, offering him intercourse if he helped her get away. When James Giles and Johnson joined them she offered no resistance to intercourse. Fright might explain the lack of resistance or outcry, but not her failure to ask to be let alone. (Her conversation with John Giles proved that she had not been struck dumb.) She was not threatened or subjected to violence. She removed her own clothes.

Petitioners' account to the police claimed consent and, if true, indicated that Joyce was mentally disturbed and

sexually promiscuous. Petitioners also told the police that Joyce had said she was on probation. (*Supra*, p. 12) Lieutenant Whalen also knew that Joyce had been taken to a psychiatrist (*supra*, p. 10). The charge was of a capital offense, and the indigent accused had no investigative resources.

These facts demonstrated a crying need for inquiry into Joyce's record and character and for an attempt to verify the account of the accused by checking whether she was "on probation." Yet the State's Attorney and the police did not lift a finger in that direction. *Supra*, p. 10. They maintained their lethargy even after they had received the further startling news of the attempted suicide and the second rape accusation. They did so even though the specific important things to investigate were painfully obvious — the suicide attempt, the second rape accusation, and Joyce's Juvenile Court record — and though the information they neglected to procure was readily obtainable, being in the hands of the authorities of an adjacent county.

In short, the State's Attorney and the police did not merely overlook, they determinedly rejected exposure to, information favorable to the accused despite the suspicious circumstances surrounding the accusation. It is unbelievable that they would have shown the same apathy if the social and economic status of the protagonists had been reversed — if the accused had been white, middle-class youths and the complaining witness an impoverished Negro girl.

On principle and under the authorities, the prosecution should be charged with knowledge of information which it failed to obtain by reason of such culpable neglect.

Prosecution suppression of material evidence renders a conviction unconstitutional even though the State officials acted in good faith. *Brady v. Maryland*, 373 U.S. 83, 87. It follows that a negligent suppression of material evidence is unconstitutional.

Ordinarily, the negligence consists of a breach of duty to communicate evidence to the accused. But communication is not the only duty involved. Thus the State also has a duty to preserve exculpatory evidence, so that its negligent loss by the State renders a conviction unconstitutional. *Kyle v. United States*, 297 F.2d 507 (2d Cir.); *United States v. Heath*, 147 F. Supp. 877 (D. Hawaii); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir.). Cf. *United States v. Lonardo*, 350 F.2d 523 (6th Cir.) (conviction reversed because of deliberate destruction of Jencks Act statements).

What is involved here is a cognate duty, that of the State to exercise rudimentary diligence to *acquire*, and certainly not to avoid, relevant evidence. The existence of such a duty has been recognized. In *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill.), habeas corpus relief was granted on the ground that "the prosecution either knew or should have known" of important exculpatory evidence and was "charged with the knowledge" (at 390). The court also stated (at 387) that a prosecutor "must not willingly ignore that which is in an accused's favor."

Smith v. Commonwealth, 331 Mass. 585, 121 N.E.2d 707, holds that the prosecution has a duty to investigate an accused's reasonable claim of an alibi, even if the prosecutor in good faith believes that the defendant is guilty. *People v. Fishgold*, 71 N.Y. Supp. 2d 830 (Kings Cty. Ct.), recognizes the duty of the State to investigate the credibility of its witnesses. See also *In Re Imbler*, 35 Cal. Rptr. 293, 300, 387 P.2d 6, 13, stating: "We have no doubt that negligence of representatives of the state in preparing and presenting a criminal prosecution could in some cases result in a denial of a fair trial."

D. The defense did not know, and is not chargeable with knowledge of, the withheld information.

There can, of course, be no unconstitutional suppression of information known to the defense in time for the trial.

It is unquestioned, and the record establishes without contradiction, that petitioners' assigned counsel had no knowledge of the information which we assert was unconstitutionally suppressed — Joyce Roberts' second rape accusation, her near-probation status, her attempted suicide, her confinement to a hospital psychiatric ward, and her revelations to Sergeant Wheeler of her sexual promiscuity and the falsity of her second rape accusation. As counsel testified, all he knew of Joyce's background was his clients' account to him of what she told them on the night of July 20, 1961. Counsel's attempt to get further information was frustrated by his inability to interview Joyce and to obtain Juvenile Court records. *Supra*, p. 13.

Nevertheless, the Court of Appeals held that "the defense must have known of the prosecutrix' general reputation for unchastity and that she was a sexually promiscuous girl." This holding was based on the fact that petitioners' account to their counsel raised "some question as to the character of the prosecutrix which properly could have been investigated." (R. 306.)

The court thus applied a double standard. It refused to charge the negligent prosecution with constructive knowledge. It charged the diligent defense counsel with constructive knowledge.

The holding is both irrelevant and wrong. It is irrelevant because the constructive knowledge attributed to the defense is not co-extensive with the evidence which was suppressed. Nor was any suspicion of Joyce's character, engendered by petitioners' account of her actions, a substitute for the factual information which the prosecution knew or should be charged with knowing.

The holding is wrong, not only because defense counsel was diligent, but also because accused persons cannot be held responsible for a failure of even non-diligent counsel to obtain exculpatory information in the hands of the State. *Barbee v. Warden*, 331 F.2d 842, 845 (4th Cir.); *People v. Hoffner*, 129 N.Y. Supp. 2d 833 (Queens Cty. Ct.). This is particularly true when counsel was appointed by reason of the indigency of the accused. It cannot be contended that the denial of a constitutional right to disclosure of exculpatory evidence possessed by the State is excused by the deprivation of the constitutional right to effective representation by counsel.

II.

The decision of the Maryland Court of Appeals denied petitioners the equal protection of the laws.

The court below virtually conceded that the suppressed evidence of the attempted suicide and the second rape accusation "was reasonably admissible" (R. 304). For reasons already canvassed, the concession was obviously correct. The court held, nevertheless, that the prosecution's breach of its duty to disclose this evidence did not constitute a violation of due process because the evidence was not sufficiently exculpatory and its suppression was not prejudicial.

This decision denied petitioners the equal protection of the laws, in violation of the Fourteenth Amendment, in view of Maryland's unique provision that the jury is the judge of the law as well as the facts. Md. Constitution, Art. XV, § 5, *infra*, Appendix A. For by its holding the court substituted court determination for the right of jury determination in an erratically selected class of cases — those in which the prosecution has suppressed admissible evidence.

Brady v. Maryland, 373 U.S. 83, held that the Maryland

Court of Appeals had not violated equal protection by according no more than a new trial limited to the issue of punishment where the prosecution had suppressed evidence relevant only to punishment. The holding was based, however, on the fact that despite the Maryland provision on the authority of the jury, the Maryland courts had retained the power to determine the admissibility of evidence. Both the opinion of the Court and the dissenting opinion of Justices Harlan and Black recognized that the equal protection clause would have been violated by the holding of the Court of Appeals if the suppressed evidence had been admissible on the issue of guilt as well as punishment. See *Brady* at 89, 92-93.

In the present case, the suppressed evidence of the suicide attempt and second rape accusation was admissible on the issue of guilt. As the dissenting opinion pointed out (R. 313), the judges in the majority, by holding that this concededly withheld evidence was insufficiently exculpatory, were "arguing the weight of the evidence and put themselves in the place of the triers of the facts." Hence *Brady v. Maryland* teaches that the Court of Appeals denied petitioners equal protection by substituting its appraisal of the exculpatory value of the suppressed evidence for the jury's.

III.

Petitioners were deprived of due process by being denied an opportunity to obtain a new trial on the basis of newly-discovered evidence.

Under Maryland law, as it existed before being modified too late to benefit petitioners, newly-discovered evidence, no matter how cogent, was not available as a ground for setting aside a conviction, with the academic exception of a new-trial motion filed within three days after verdict. As a result, petitioners, serving life sen-

tences after a commutation of death penalties, have been and are precluded from obtaining judicial consideration of the massive new evidence of their innocence²⁸ which was not available at the trial and which neither they nor their appointed counsel could possibly have discovered before trial. *Supra*, pp. 13-15:

In our view, the due process clause requires a state to provide to condemned persons a reasonable opportunity to demonstrate their innocence on the basis of after-discovered evidence. In holding the contrary, the court below simply cited (R. 299) its prior decision, *Brown v. State*, 237 Md. 492, 498, 207 A.2d 103, which relied on the fact that the federal Constitution does not require a state to provide appellate review of criminal convictions. *Griffin v. Illinois*, 351 U.S. 12, 18. The analogy is unsound. Dispensing with appellate review represents nothing more than the concentration of the state's judicial power at a single level. But refusal to allow a remedy based on after-discovered evidence involves not a distribution of judicial power, but instead a denial of access to any judicial forum by one seeking redress. Such a denial is obviously subject to constitutional limitations, including a restriction that it not be arbitrary or irrational. Cf. *Lane v. Brown*, 372 U.S. 477; *Boyd v. United States*, 116 U.S. 616; *Societe Internationale v. Rogers*, 357 U.S. 197, 209-11.

It is only in primitive or despotic societies that infallibility is attributed to the tribunals of the sovereign. In more enlightened civilizations, it is recognized that miscarriages of justice can and do occur, and that provision must be accorded for their rectification.

²⁸ At petitioners' clemency hearing there were presented letters to the Governor from five of the jurors in petitioners' criminal trial who had seen the new evidence which had by then been assembled, stating that if they had known at the trial what they now knew, they would not have voted to convict. Kempton, Clemency in Annapolis, New Republic, Oct. 26, 1963, pp. 6, 8.

What is the interest which justifies the State of Maryland in continuing the lifelong imprisonment of persons who, if given the opportunity, could demonstrate their innocence? There are, of course, valid reasons for protecting the finality of judgments. But it is shocking that the policy against punishing the innocent should be wholly sacrificed to the lesser policy favoring finality. Other jurisdictions have had no untoward results when they have accommodated the two policies by allowing a reasonable time for the production of newly-discovered evidence. Cf. Rule 33, Fed. Rules Cr. Proc., allowing two years after final judgment.

Maryland's archaic rules precluding judicial consideration of newly-discovered evidence contravene a deep-grained American tradition, evidenced in innumerable popular narratives, that victims of injustice can be freed when the evidence of their victimization is uncovered. Maryland's rules violate the expanding requirements of due process because they offend a "fundamental" principle of justice (*Snyder v. Massachusetts*, 291 U.S. 97, 105), are "repugnant to the conscience" (*Palko v. Connecticut*, 302 U.S. 319, 323), and contain a built-in "invidious discrimination" against defendants who are too poor to conduct extensive pre-trial investigations. *Griffin v. Illinois*, 351 U.S. 12.

CONCLUSION

The judgment below should be reversed with the direction that petitioners be released from imprisonment unless afforded a new trial within a reasonable time.

Respectfully submitted,

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APPENDIX

STATUTES AND RULES INVOLVED

1. Md. Ann. Code (1957) Art. 27, § 461, provides:

"§ 461: Rape generally.

Every person convicted of the crime of rape or as being accessory thereto before the fact shall, at the discretion of the court, suffer death, or be sentenced to confinement in the penitentiary for the period of his natural life, or undergo a confinement in the penitentiary for not less than eighteen months nor more than twenty-one years; and penetration shall be evidence of rape, without proof of emission."

2. The Maryland Post Conviction Procedure Act, Md. Laws 1959, c. 429,¹ provided in part as follows:

"§ 645A. Right of appeal of convicted persons.

(a) *Appeal in lieu of former remedies; when denied.*—

Any person convicted of a crime and incarcerated under sentence of death or imprisonment, . . . who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court . . . was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy, may institute a proceeding

¹ This provision was revised in respects not material hereto while this case was pending in the Maryland Court of Appeals. Md. Laws 1965, c. 442, Art. 27, § 645A, 1965 Cum. Supp. to Md. Ann. Code (1957).

under this subtitle to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction."

3. Maryland Rules of Procedure, vol. 9B, Md. Ann. Code (1957), prescribed by the Court of Appeals of Maryland, contains the following provisions, among others, under Subtitle BK, Post Conviction Procedure:

"Rule BK 40. How Commenced—Venue.

A proceeding under the Uniform Post Conviction Procedure Act shall be commenced by the filing of a verified petition in a court having criminal jurisdiction in the county where the conviction took place."

"Rule BK 44. Hearing.

d. *Evidence.*

The court may receive proof by affidavit or deposition and may also take oral testimony or other evidence, where justice so requires."

"Rule BK 45. Order of Court.

a. *Scope.*

After the hearing the court shall make such order on the petition as justice may require. In the event the order shall be in favor of the petitioner, the court may also provide for rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.

c. *Finality.*

Such order shall constitute a final judgment for purposes of review."

4. Rules 567a and 759a² of the Maryland Rules of Procedure provide:

"Rule 567. New Trial . . . Law.

a. *Motion — When To Be Filed.*

A motion for a new trial shall be filed within three days after the reception of a verdict, or, in case of a special verdict or a trial by the court within three days after the entry of a judgment *nisi*."

"Rule 759. Motions After Verdict.

a. *Motion for New Trial.*

A motion for a new trial shall be made pursuant to Rule 567 (New Trial). A motion for a new trial shall be heard by the court in which the motion is pending, except that in the case of a motion for a new trial pending in the Criminal Court of Baltimore, such motion shall be heard by the Supreme Bench of Baltimore City. The court may grant a new trial if required in the interest of justice."

5. Article XV, Section 5 of the Constitution of Maryland provides:

"In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass on the sufficiency of the evidence to sustain a conviction."

² Rule 567 is a civil rule, and Rule 759 applies to criminal causes. See original Md. Rule 2b and newly revised Md. Rule 1e